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Supreme Court of the United States

JANUARY TERM, 1952

RALPH CASEY, GEORGE LACLAIR and EDWARD PLESA,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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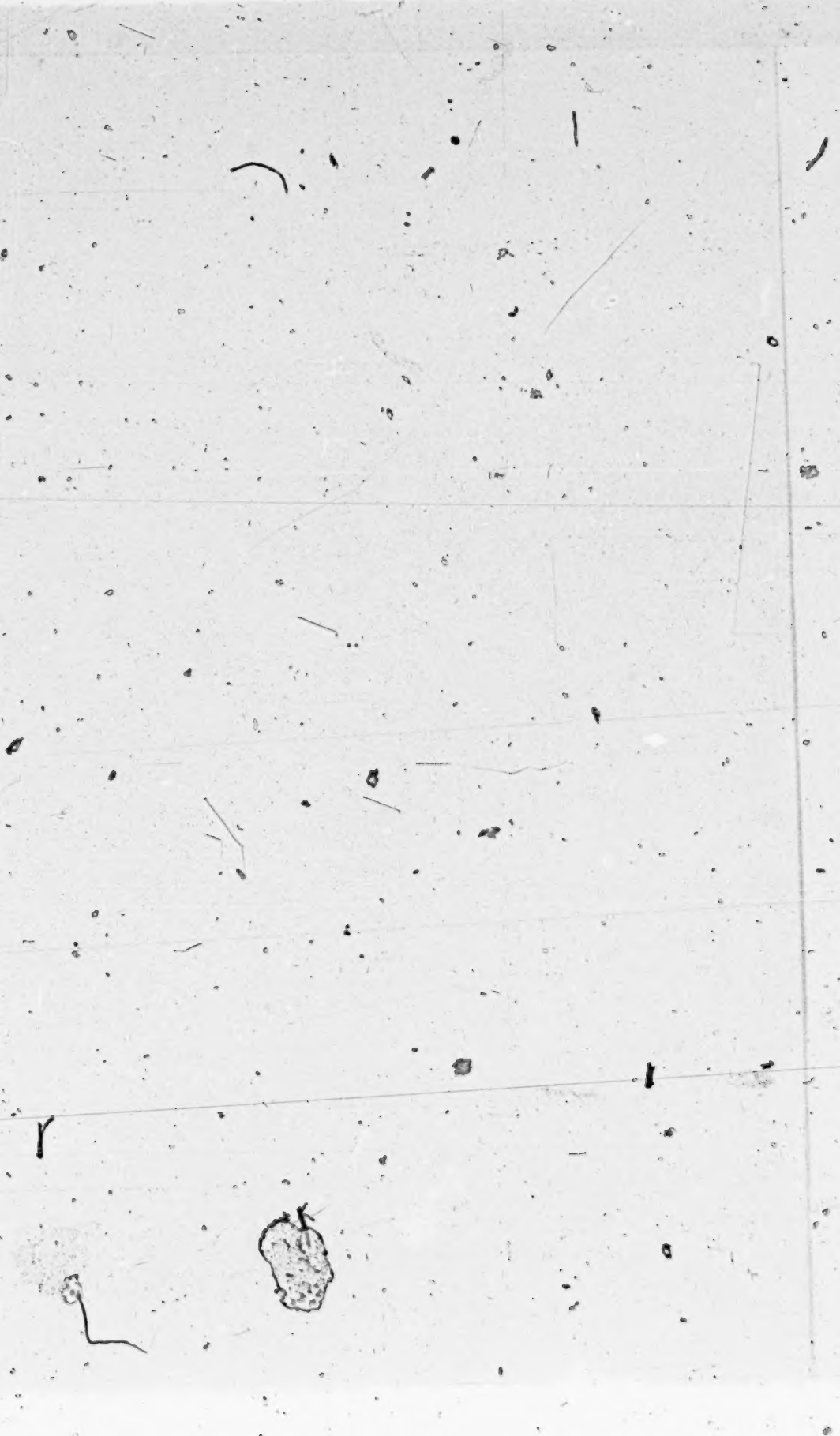
THE ARGUS PRESS, SEATTLE



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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The judgment of the trial court was rendered on the 12th day of Septemer, 1949 (R. 24).

The opinion and judgment of the Court of Appeals was rendered and filed on June 27, 1951 (as amended by order of September 14, 1951 (R. 326, 327). The opinion of the Court of Appeals is reported at 191 F.(2d) 1.

The petition for rehearing was denied by the Court of Appeals on September 14, 1951 (R. 328).

JURISDICTION

The date of the judgment to be reviewed is June 27, 1951 (R. 327), and the date of the Denial of the Petition for Rehearing is September 14, 1951 (R. 328). The Petition for a Writ of Certiorari was filed on October

10, 1951, and the Order granting the Writ was entered December 3, 1951.

The jurisdiction of this court is invoked under Section 240a of Judicial Code as amended, Title 28 U.S.C., Secs. 1254(1) and 2106 (28 U.S.C.A. Secs. 1254(1) and 2106). See also Rule 38(5b), Revised Rules of the Supreme Court (28 U.S.C.A.).

STATEMENT OF THE CASE AND THE MATTERS INVOLVED

The petitioners were convicted in the District Court of the Western District of Washington, Northern Division, on six counts of an indictment, three of which charged them with operation of radio apparatus for the transmission of energy, communications and signals without first obtaining a station license, all in violation of Section 301, Title 47, United States Code, and three of which charged them with operating radio apparatus for the transmission of energy, communications and signals without first obtaining a radio operator's license, the radio apparatus being set up as a radio station for which a radio station license is required, all in violation of Section 318, Title 47, U.S.C. (R. 2-6).

As the result of a complaint made by the Police Department of the City of Everett, Washington, to the Federal Communications Commission in Seattle, Washington, to the effect that an unlicensed radio transmitter had been used by unknown individuals to bilk race track "bookies" out of a large sum of money, the officer in charge of the Federal Communications

Commission in Seattle commenced an investigation for the purpose of locating said transmitter. The investigation was commenced on or about January 25, 1949 (R. 90-91, 207-208) by Federal Communications Commission radio engineers, who are not law enforcement agents or officers. On February 2, 1949, a complaint was received that a broadcast had been made on a frequency of 3936 kilocycles (R. 52). No complaints other than this were received between that time and February 7, during which time the investigation had been proceeding by the Federal Communications Commission, excepting from two amateurs who heard an unidentifiable signal about 7:10 P.M. on February 7, 1949, in the State of Oregon (R. 40-41, 48-49). The signals heard on February 7 were on a frequency of approximately 3540 kilocycles. The Federal Communications Commission investigators were unable to locate any unauthorized signal on a frequency of 3936 kilocycles, but did hear a voice testing for modulation on a frequency of 3540 kilocycles (R. 53). Because they heard no call letters, they concluded that they were listening to an unlicensed station.

On February 10, 1949, at about 12:26 P.M., the engineer-investigators again heard a signal which they concluded was emarating from the Benjamin Franklin Hotel, located on the corner of Fifth and Virginia Streets in Seattle, Washington (R. 66-67). Three of them entered the hotel, and, using a direction finder, determined that the signal was coming from room 1217. The investigators did not know at this time to whom the room had been registered, nor had they seen the persons registered in that room. The investigator in

charge heard a voice saying, "Testing 1-2-3-4 for modulation." This was at 1:46 P.M. The Federal Communications Commission investigators returned to the lobby and checked the hotel records and discovered that the room was registered in the names of the petitioners (R. 71). The investigator in charge then left the hotel and went to the United States Court House to secure a warrant for the arrest of the petitioners. He left at about 1:52 P.M. Two other investigators remained in the lobby of the hotel for a few minutes and then returned to their office. Upon arriving there, one of them received a telephone call from the hotel manager (R. 192, 212-213) who stated that petitioners were about to check out and that their car was located at the Motor Ramp Garage (R. 192-193, 212-213). Thereupon, one of the investigators telephoned the attendant at the garage, stating he was a federal officer and requesting the attendant to disable the car so that it could not be moved prior to the arrest of the petitioners. This was sometime between 1:52 P.M. and 2:15 P.M. (R. 193, 224-225). The attendant complied with this request by disabling petitioners' car (R. 225-226). Immediately after this, these two engineer-investigators went to the Motor Ramp Garage, a garage not connected with the hotel but independently operated, located at Sixth and Westlake, Seattle, Washington, approximately eight blocks from the Federal Court House and two blocks from the Benjamin Franklin Hotel, arriving there at 2:15 P.M. (R. 140). When they first entered the garage, they talked to an attendant there, had the attendant point out the car of the petitioners (a 1948 Packard convertible coupe) (R. 141-142), asked the at-

tendant to unlock the car, which was done, and they then searched the automobile and the baggage, and then returned the baggage to the car (R. 227-228). One of them then had a telephone conversation with the engineer in charge of the Federal Communications Commission as the result of which he went out to obtain the services of a policeman to prevent the petitioners from moving the car in the event they attempted so to do until a warrant for their arrest could be served (R. 143). A warrant for the arrest was subsequently issued and was served by Marshal Scully upon the petitioners in room 1217 of the Benjamin Franklin Hotel at 3:20 P.M. The Marshal searched the room but discovered nothing (R. 72-74). Following the arrest, the Federal Communications Commission investigators, who were neither law enforcement officers nor agents, again returned to the Motor Ramp Garage and removed the articles theretofore discovered from the automobile, which articles consisted of radio transmitting equipment and a receiver.

Between 1:47 P.M., when the Federal Communications Commission investigator went to the Court House to get a warrant for arrest, and 3:20 P.M., when the arrest was made, a search had been made of the petitioners' automobile in a garage several blocks from the place where the arrest was subsequently made, said search being made without warrant although a magistrate was then available and no apparent necessity for search without a warrant existed (R. 19-21, 108, 155), and said search and subsequent seizure of petitioners' property was made by persons who were not law enforcement officers and who, under any circumstances,

had no right to make a search and seizure with or without warrant.

Motion to suppress the evidence thus obtained was made prior to trial (R. 12-14). Two of the Federal Communications Commission investigators filed counter-affidavits in resistance to the motion. In both of the affidavits the investigators described themselves as engineers; in neither was there any intimation that the investigators were law enforcement agents or otherwise had the right or authority to search and seize the property of petitioners (R. 14, 17-21).

Thereafter, petitioners objected to the introduction of the articles seized (R. 76-77), renewed their objection at the conclusion of the Government's case (R. 231-235), and renewed their motion to suppress prior to presenting their case (R. 236). These objections and motions were overruled by the trial court. After the jury returned a verdict against petitioners, petitioners moved for a new trial on the ground, *inter alia*, that the trial court erred in failing to suppress the evidence thus obtained.

On the appeal to the Court of Appeals, that court held that petitioners were not entitled to claim the constitutional protection from unreasonable searches and seizures on the ground that they did not claim ownership or interest in the radio equipment seized, and because the car and its contents were in the hands of a bailee for hire.

In the appellate court, petitioners further claimed that Sections 301 and 318, Title 47, U.S.C., were unconstitutional because of an improper delegation of

legislative power to the Federal Communications Commission because the statute delegated to the Commission arbitrary discretion to waive or modify certain provisions therein and determine whom shall be prosecuted for violation thereof, and said statute set up no standard by which this discretion could be measured. The Court of Appeals rejected this contention and held that the statute set up a standard of public convenience and necessity which was sufficient and adequate.

SPECIFICATION OF ERRORS

1. The District Court erred: (a) in denying appellants' motion to suppress evidence obtained by unlawful search and seizure and to return evidence seized thereby; (b) in refusing to exclude said evidence at trial; and (c) in refusing to grant petitioners' motion for a new trial.

2. The Court of Appeals erred in holding that petitioners were not entitled to invoke the constitutional protection against unreasonable searches and seizures for failing to claim ownership or an interest in the articles seized.

3. The Court of Appeals erred in not holding that the search and seizure was unlawful and unreasonable.

4. The Court of Appeals erred in holding that Secs. 301 and 318 of Title 47, U.S.C., set up a sufficient and adequate standard to measure administrative discretion and was, therefore, constitutional.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Constitutional and other provisions involved are set forth in appendix pages 31 to 36, *infra*.

ARGUMENT

Summary of Argument

1. The District Court misapplied the rule of *Carroll v. United States*, 267 U.S. 132, in holding that that case was controlling to prevent suppression of the evidence obtained by illegal search and seizure.

2. Contrary to the sole and only evidence in the record as to petitioners' ownership of the seized articles, the Court of Appeals held that petitioners did not claim ownership of the seized articles, and, further, since petitioners' automobile was in the possession of a garage, a bailee for hire, they were not entitled to invoke the constitutional guarantee against unreasonable searches and seizure.

3. In failing to hold that the search and seizure was unlawful and unreasonable, the decision of the Court of Appeals was contrary to prior decisions of this court. *Agnello v. United States*, 269 U.S. 20; *Byars v. United States*, 273 U.S. 28; *Go-Bart Co. v. United States*, 282 U.S. 344; *Lustig v. United States*, 338 U.S. 74; *Johnson v. United States*, 333 U.S. 13; *United States v. Jeffers*, No. 3 October Term, 1951, decided November 13, 1951 (72 S.Ct. 93).

4. All motions and objections directed against the admission of or directed towards the striking of the

illegally obtained evidence were made in behalf of all three petitioners.

5. The decision of the Courts of Appeals in holding Secs. 301 and 318 of Title 47, U.S.C. constitutional is in conflict with prior decisions of this court. *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Schecter Corp. v. United States*, 295 U.S. 495.

Point One

In refusing to grant petitioners' motion to suppress evidence illegally obtained, the District Court did so solely on the basis of *Carroll v. United States*, supra (R. 234, 235). It is apparent that the District Court misconstrued entirely the scope of the rule laid down in the *Carroll* case. Searches of automobiles without warrant have been upheld only on the basis of the National Prohibition Act or because the matters involved were contraband articles expressly declared to be subject to siezure and forfeiture by express act of Congress. See *Carroll v. United States*, supra; *Husty v. United States*, 282 U.S. 694; *Scher v. United States*, 305 U.S. 251; *Brinegar v. United States*, 338 U.S. 160 (Sec. 781 (b), Title 49, U.S.C.).

The holding in the *Carroll* case must be considered in the light of *United States v. DeRi*, 332 U.S. 581, where this Court said at page 584:

> "The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of *Carroll v. United States*, 267 U.S. 132. That search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act *and of that act alone.*

Transportation of liquor in violation of that Act subjected first the liquor, and then the vehicle in which it was found, to seizure and confiscation, and the person 'in charge thereof' to arrest. The court reviewed the legislative history of enforcement legislation and concluded (at page 147), 'The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable.' The progeny of the *Carroll* case likewise dealt with searches and seizures under this Act. *Husty v. United States,* 282 U. S. 694." (Footnotes omitted) (Emphasis supplied)

It would indeed be stretching the rule laid down in the *Carroll* case to an illogical conclusion to say that the express authorization of Congress declaring liquor to be contraband, and therefore subject to search and seizure, constituted justifiable grounds for permitting the search and seizure by law enforcement officers or by administrative agents of the Federal Government to search any vehicle believed to contain anything that would be of evidentiary value in carrying out that agency's delegation of authority. The basic framework for a police state would be complete if such a rule were adopted.

"When the right of privacy must reasonably yield to the right of search is, as a rule, to be de-

cided by a judicial officer, not by a policeman or government enforcement agent." *United States v. Asendio,* 171 F.(2d) 122.

"A search and seizure cannot be reasonable, and therefore justified, if it is based solely on the purpose of obtaining nothing but information generally, which may, perhaps, be proof that a crime had been committed. Evidence so obtained is not admissible against the person or persons whose rights have been violated. To admit it would be contrary to the Fifth Amendment in that part which reads 'No person * * * shall be compelled in any criminal case to be a witness against himself.'" *Boyd v. United States,* 116 U.S. 616; *Gouled v. United States,* 225 U.S. 298.

Petitioners respectfully submit that neither the *Carroll* case nor the horde of cases since decided in reliance thereon, go so far as to permit the search of any automobile, without a search warrant, that may be suspected of being connected with a crime, even on reasonable cause to believe that the automobile contains evidence that may be connected with the perpetration of a crime, except where there is reasonable ground to believe that the vehicle is being used to carry "contraband" as defined in the statutes.

The rule in the *Carroll* case was predicated on specific legislation and was not intended to be extended beyond the facts of that case. As the Supreme Court said in *United States v. DeRi, supra,* 584, 585:

"Obviously, the court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional. In view of the strong presumption

of Constitutionality due to an act of Congress, especially when it turns on what is 'reasonable,' the *Carroll* decision falls short of establishing a doctrine that, *without such legislation,* automobiles nonetheless are subject to search without a warrant in enforcement of all Federal Statutes. *This court has never yet said so.*" (Emphasis supplied)

It is well to observe the caution of the Supreme Court in the *DeRi* case:

> "We need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant *on reasonable cause to believe it carries contraband.*" *United States v. DeRi, supra.* (Emphasis supplied)

It must be borne in mind that in the case now before the court, radio transmitters and receivers are not contraband. The mere fact of possession of these articles violates no law of the United States and subjects no one to arrest. Furthermore, having already illegally disabled petitioners' car, there was no necessity for an immediate search; petitioners could not have driven off in their disabled car. The investigators were present to personally detain petitioners (R. 194), or to follow them (R. 140). There were no exceptional circumstances present to justify the actions of the investigators in proceeding to search and seize without a warrant. See *United States v. Jeffers, supra.*

Point Two

Throughout the entire trial of the case, the United States Attorney tacitly conceded petitioners' ownership of the radio equipment and urged only, as the basis

for denial of the motion to suppress, that the facts in the case were governed by the decision in *Carroll v. United States, supra.* On the appeal, the Court of Appeals apparently agreed with counsel for petitioners that the *Carroll* case was not controlling for it cannot be contended that the Court of Appeals "overlooked" the *Carroll* case; the trial court made it clear that it denied petitioners' motion because it deemed that case controlling (R. 234-235). The respondent United States devoted several pages of its brief in the Court of Appeals in discussing that case, as did petitioners. During the course of oral argument, the members of the Court of Appeals in open court expressed the opinion that the *Carroll* case was not controlling. But the appellate court then proceeded to deny petitioners the right to claim the protection of the Constitution against unreasonable search and seizure on the ground that petitioners did not claim ownership of or an interest in the articles seized (R. 323). This is contrary to the theory upon which the case was tried and contrary to the sole and only evidence on this point in the case.

The evidence clearly showed ownership in the petitioners. The testimony was that petitioner George LaClair *bought the equipment for* $50.00. His testimony is as follows:

> "Q. With reference to Plaintiff's Exhibits 5 and 6, the radio transmitter and equipment, when did you first see the items contained in those two exhibits?
>
> A. Well, the items contained in the exhibit I seen the early part of that week. We got there Sunday night, I would say it was either Monday or

Tuesday. I didn't see the case, the suitcase I didn't see. I seen the contents of it, but not the suitcase.

Q. Where was it that you saw it?

A. In Olympia, Washington.

Q. Who was present?

A. There was Casey, Plesa, there was two other gentlemen present and myself.

Q. Name who the other gentlemen were.

A. One fellow's name was Johnny Wilcie, and the other gentleman, I don't know his name. I know him by sight but I don't know his name.

Q. Where was it?

A. In a restaurant in Olympia.

Q. Where was this equipment?

A. Johnny Wilcie had it.

Q. Did you have a conversation, all of you together, about this equipment?

A. Yes, sir." (R. 250) * * *

"Q. Then what occurred? Just tell what happened.

A. Well, we didn't do any business with him, we didn't know if we had any use for it, so finally he got to the point where he would take $50. He said the equipment was worth a couple of hundred dollars, *so I bought it for* $50." (R. 252)

"Q. Were you at any time hiding this machine from anybody?

A. No, sir.

Q. Never tried to hide it?

A. No, sir.

Q. Where was the machine going when it was in your car out there in the Motor Ramp Garage?

A. We decided to bring it to a radio man to try to get it so it would work." (R. 256) * * *

"Q. *You say after the purchase of this that you yourself paid for it but that everybody chipped in, is that correct?*

A. *Yes, sir.*" (R. 258) * * *

"Q. When John Wilcie sold you that transmitter, did he sell you that 3536 crystal there?

A. Whatever *he sold me is there,* outside of maybe a battery, a battery or the big bag, we bought the big bag." (R. 261) * * *

To the same effect is testimony of petitioner Edward Plesa:

"Q. This Exhibit 5 and 6 which is the transmitter, when did you first see that?

A. I seen it a few days after they came in.

Q. And where did you first see it?

A. Down at Ben Moore's poolroom, I think it was." (R. 267) * * *

"Q. Tell the court and jury what occurred.

A. We went in and was going to start playing pool or something, fooling around in the poolroom there, and he come in and told us he was broke and wanted to leave, wanted to know if he could sell us something, borrow some money at first, and we couldn't give him none, we didn't know him well enough. So he had something he said he would sell us, so we asked him what it was, and he had a couple of boxes in this poolroom right there, and he showed it to us, and told us it was worth more

than he wanted for it, *and so we wind up buying it.* He told us we could use it for a shooting range or something like that. He says that is what it has been used for.

Q. *Is that where you got this transmitter then?*

A. *Yes, sir.*

Q. Then you came on up to Seattle with LaClair and Casey, is that right?

A. Yes, sir." (R. 268) * * *

This is corroborated by testimony of petitioner Ralph Casey:

"Q. Exhibits 5 and 6, you are familiar with the exhibits, aren't you? You know what those are?

A. Yes.

Q. When did you first see those?

A. I seen them down in this poolroom down there. That is the first I ever seen them.

Q. *Did you and George LeClair obtain them at that poolroom?*

A. *Yes.*

Q. *From whom did you obtain them?*

A. *John Wilcie.*" (R. 274) * * *

"Q. *After you obtained this equipment, which is Plaintiff's Exhibits 5 and 6, did you go out and purchase a bag to carry it in?*

A. *Yes, we did.*

Q. Who was with you on that occasion,

A. *George LaClair and Eddie Plesa.*" (R. 275) * * * (Emphasis supplied)

In the opinion as rendered by the Court of Appeals on June 27, 1951, that court stated:

> "It is unnecessary to consider whether the search and seizure in this case violated constitutional rights, for the reason that the right to immunity from unreasonable searches and seizures is a personal right and can only be asserted by one who claims ownership or right to possession of the premises searched or the property seized. (Citations omitted)
>
> "None of the appellants claimed ownership or interest in the Motor Ramp Garage, the place where the search occurred. Therefore, they have no standing to complain of the search. Nor do the appellants claim ownership or an interest in the radio equipment seized. Therefore, they are not entitled to prevent the introduction in evidence of the articles seized in such search."

In petitioners' brief in support of their petition for rehearing, petitioners called to the Court of Appeals' attention the record wherein uncontradicted proof of ownership of the radio equipment in the petitioners' was established. Whereupon, the Court of Appeals by entry of an order dated September 14, 1951, amended the opinion of June 27, 1951, so that the next to the last sentence in that portion of the opinion quoted above was changed to include the words "in the showing made on the motion to suppress" (R. 323). It would seem that in departing from the theory of the Government's case, in holding that the petitioners made no claim to ownership of the property seized, and in amending its opinion to meet the petitioners' proof of ownership,

the Court of Appeals went to unreasonable lengths to uphold the conviction of petitioners.

But even so, the amended opinion and holding of the Court of Appeals is contrary to prior decisions of this court and cannot stand, for even though the fact of ownership was not clearly brought out in petitioners' affidavit before trial in support of the motion to suppress, after the evidence in the trial clearly showed that petitioners owned the property, the trial court should have granted petitioners' motion to strike the evidence or granted their motion for a new trial because of the failure to suppress the evidence thus unlawfully obtained. *Gouled v. United States, supra,* 312-313; *Amos v. United States,* 255 U.S. 313.

The Court of Appeals also held that "The conclusion above reached is not affected by the circumstance that the articles seized were located in appellant LaClair's automobile. In our opinion, since appellant LaClair did not claim ownership or an interest in the articles seized, any constitutional immunity to which he might otherwise have been entitled with respect to his automobile and its contents was lost when he placed the garage, a bailee for hire, in possession of his automobile". (R. 323). This holding is certainly erroneous in the light of *United States v. Jeffers, supra,* where this Court held that the implied permission to enter a hotel room given to "such persons as maids, janitors or repairmen in the performance of their duties" does not remove hotel rooms from the protection of the Fourth Amendment. Likewise, the fact that George LaClair placed his car in a garage, a bailee for hire, and left

the keys with the attendant did not remove him from the protection of the Fourth Amendment.

Certainly, petitioners' position here is much stronger than that of Jeffers! In the *Jeffers* case, the search was held to be illegal where the objects seized were contraband. Here, the objects were a radio transmitter and receiver, which in no sense can be considered contraband.

Point Three

It is elementary that only unreasonable searches and seizures are prohibited by the Fourth Amendment to the Constitution. *Carroll v. United States, supra.* If legally obtained, the radio equipment seized was competent evidence in establishing the corpus delicti and identifying the petitioners as parties sought in an investigation of unauthorized radio transmissions. Without this evidence, petitioners would have been entitled to a directed verdict at the close of presentation of evidence.

A search without warrant is not defendable as incidental to a lawful arrest where the search is made by Federal investigators who did not make the arrest and where the search was made in the absence of the persons who were subsequently arrested. *Lustig v. United States, supra.* Protection under the Fourth Amendment to the Constitution extends to all equally, to those justly suspected and accused as well as to the innocent. *Agnello v. United States, supra; Go-Bart Co. v. United States, supra.* Any search prosecuted in violation of the Constitution cannot be made lawful by what it

brings to light. *Byars v. United States, supra; United States v. DeRi, supra.*

The record here disclosed that at least one hour prior to the arrest of petitioners, one of the Federal communications Commission investigators had ordered the disabling of petitioners' car (R. 72-74, 224-226) (which act in itself constituted an arrest without warrant), and he and one other Federal investigator searched petitioners' car and baggage without first obtaining a warrant and discovered the radio equipment. Even though the car was in a public garage and the garage attendant had access to the keys, and, as a result, access to the car, this in no way removes the search from under the bar of the Fourth Amendment. *United States v. Jeffers, supra.* The fact that the investigators at that time returned the articles to the automobile and did not permanently confiscate the articles until after the arrest had been made would not make a subsequent seizure lawful. If the first search, being illegal, reveals the items which are later seized, the fact that the actual confiscation was made with a warrant does not wipe the taint of illegality from the entire search and seizure. The search and seizure are incapable of being untied and separated. *United States v. Jeffers, supra.*

However, the record here shows that *at no time during the entire search and seizure did the investigators procure a search warrant.* That the search and seizure was not incidental to a lawful arrest is amply born out by the record. None of the Federal investigators were in the position of being the arresting officer, as the arrest was made by a Federal Marshal (R. 178-181).

In addition, the Federal Communications Commission investigators were not in the class of Federal officers entitled to make arrests, either with or without warrant. Sections 3041, 3052 and 3053 of Title 18, U.S.C. The automobile was located in a garage two city blocks from the place of the arrest, neither the vehicle nor the garage being within an area under the control of the petitioners. See *Harris v. United States,* 331 U.S. 145; *United States v. Rabinowitz,* 339 U.S. 56. The search was begun a full hour or more prior to the arrest. It is evident that the search was made solely for the purpose of seizing whatever might be turned up on examination of the baggage in the hope that it might be of evidentiary value in connecting the petitioners with a federal crime under investigation. Such practice has been universally condemned. See *Go-Bart Co. v. United States, supra; Lefkowitz v. United States,* 285 U.S. 452; *United States v. Kirschenblatt,* 16 F.2d 202.

The language of the court in the case of *Johnson v. United States, supra,* is pertinent:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity

and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. * * * "

No excuse was shown for the failure to obtain a search warrant. The car had been *immobilized by the garage attendant at the request of the Federal Communications Commission agents.* It had been seized *at that time,* nearly an hour before the issuance of a warrant of arrest. Even before the warrant of arrest had been issued, the agents had made a search of the automobile.

When it becomes apparent during the trial that there has been an unconstitutional seizure of the property of the accused, the court should exclude the property and any testimony relating thereto given by the government agents who made the unlawful seizure on motion of the accused made after both testimony and property have been introduced in evidence against him, and this has been held to be the rule even though the trial court, prior to trial, had denied the motion to suppress. *Amos v. United States, supra; Agnello v. United States, supra; Gouled v. United States, supra.*

In the present case, if the evidence of what the officers found were stricken from the record, there is little left but suspicion that a crime had been committed. There is no corpus delicti, and no case against

petitioners. Therefore, judgment against petitioners should be reversed and petitioners discharged and left to go hence free and unfettered.

Point Four

All during the trial, the United States Attorneys and the District Court understood and treated all motions and objections made by petitioners' counsel as being made in behalf of all the petitioners. This was also true in the handling of the case before the Court of Appeals. Now that the case is before the Supreme Court of the United States, respondents suggest for the first time that petitioners Casey and Plesa have no standing to object to the search and seizure "by their failure to join in the motion to suppress or to assert, until after the seized evidence had been admitted, any property interest in it" (Note 2, page 9, respondent's memorandum in answer to petitioners' brief in support of petition for writ of certiorari).

The affidavit of petitioner LaClair in support of the motion to suppress indicated the nature of the motion and that it was made on behalf of all the petitioners when he stated that ". . . said search and seizure was against the wishes of affiant *and the other defendants*" (R. 13-14) (Emphasis supplied).

Each time the transmitter and receiver were offered in evidence, counsel for petitioners objected and moved to suppress (R. 76-77, 231-233). It cannot be denied that the objections and motions were made on behalf of all three petitioners. The District Court, itself, treated the motion and objections as being made in behalf of all three petitioners by ruling: "The objec-

tions to those exhibits and *each and all the objections are overruled.* . . . The motion is denied as to *each defendant*" (R.235-236) (Emphasis supplied).

It is apparent from other circumstances attending the trial of petitioners that, as a practical matter, the trial court and counsel for petitioners and respondent all intended to and did treat all motions and objections to the admission of the illegally seized evidence as being made on behalf of all petitioners. Since all three were being tried at the same time, there was no way for the trial court to grant the motion to suppress as to one petitioner and order return of the equipment to him, and deny it as to the others, *unless* the court were to order separate trials for each of the defendants. It would be illogical and highly prejudicial to the petitioner benefitted under the ruling to have such evidence admitted against the other two petitioners during a time when he was being tried. Furthermore, as a practical matter, assuming for the purpose of argument only, the trial court had granted the motion to suppress as to petitioner LaClair alone, under the form of the motion the court would have also ordered the return of this equipment to LaClair. Upon the return of the equipment, there would be nothing present for the respondent to offer in evidence. However, aside from the practical aspects as pointed out, it is apparent that all the motions and objections directed against the admissibility of the radio and transmitters were made in behalf of all three petitioners.

In support of its present position, the United States cites the dicta in *Cogen v. United States*, 278 U.S. 221,

223. The rule suggested by respondent is but a rule of practice, *Gouled v. United States, supra; Cogen v. United States, supra,* and as stated by this Court in the *Gouled* case at page 312:

> "We think rather that it is a rule to be used *to secure the ends of justice* under the circumstances presented by each case, and where, in the progress of a trial it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission *or a motion for their exclusion and to consider and decide the question as then presented,* even where a motion to return the papers may have been denied before trial. *A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.*" *Gouled v. United States, supra* (Emphasis supplied).

See also *Amos v. United States, supra,* where a motion to suppress evidence illegally obtained was made after commencement of trial and a motion to strike was made after admittance of the evidence were held to be timely. In the *Amos* case, the facts pertaining to the illegal search and seizure were brought out *after* the evidence had been introduced in evidence.

The *Gouled* and *Amos* cases were further amplified in the case of *Ganci v. United States,* 287 Fed. 60, cert. denied 262 U.S. 755, where at the time the evidence obtained by illegal search and seizure was offered and received in evidence, no objection nor appropriate motion to exclude was made. No motion to suppress was made prior to this. Thereafter the defendant, Ganci, took the stand. At the conclusion of his testimony, his

counsel moved "to strike out the testimony of the officer that was given with relation to taking a box out of Ganci's place on the ground that it appears from their evidence and from their testimony that they had no warrant of seizure, that they went into his place of business, to his home without any warrant of seizure, and that they took out of his place a box which they claim is a box which they produce here now, which is illegal evidence and has no place here."

This motion was denied. On appeal, the Court of Appeals (Second Circuit) held:

> "Whatever, at any time, may have been the view as to what constituted a seasonable application to require the government to return seized property or as to what should be regarded as a timely objection, there can now be no doubt that at any time prior to verdict, a motion such as was here made must be entertained."

The court cited *Gouled v. United States, supra,* and *Amos v. United States, supra.*

Point Five

Under prior decisions of this court, it has been established that legislative power is unconstitutionally delegated to administrative or executive officers when the legislation embodies no standard, or no definition of the circumstances and conditions under which the administrative or executive agency is to act. *Panama Refining Co. v. Ryan, supra; Schechter Poultry Corp. v. United States, supra.* In the *Panama Refining Co.* case, a standard measured in terms of the public good was held to be insufficient. In the instant case, the

Court of Appeals held that a standard measured by "public interest, convenience or necessity" was sufficiently adequate (R. 326) to guide the Federal Communications Commission in determining when the provisions of Sections 301, 318 Title 47, U.S.C., should be modified to determine whom should or should not be prosecuted for violation thereof. It is submitted that "public interest, convenience or necessity" is no more susceptible of definition than "public good" and that the above cited sections of Title 47 U.S.C. are unconstitutional.

In support of its position upholding the constitutionality of Section 318 of the Federal Communications Commission Act, challenged on the ground that it contains an unlawful delegation of legislative authority to the Commission because no standard or guide is set up whereby the exercise of discretion may be measured, the court held that the phrase "public interest, convenience or necessity" is a sufficient standard, and cites two cases as supporting this conclusion. The first case is *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 285. This case had only to do with the exercise of a discretion in the granting or withholding of licenses applied for by radio companies. The second case, that of *National Broadcasting Co. v. United States*, 319 U.S. 190, 225, in effect held that legislative power is not unconstitutionally delegated by the Federal Communications Act of 1934 in empowering the Federal Communications Commission to adopt such regulations applicable to radio stations engaged in chain broadcasting, and further holding that the Federal Communica-

tions Commission did not exceed its allowable discretion in adopting regulations providing that a broadcasting license shall not be granted to a radio broadcasting station having certain contracts, agreements, etc., with a network organization which precludes it from broadcasting the programs of other network organizations. These regulations are, of course, always subject to review by the proper constituted tribunals as provided by the Act. We do not see the similarity of the cases cited to a case where a Federal Communications Commission agent, by his own testimony, determines that if, in his opinion, an individual has violated the law he is guilty of a willful violation thereof notwithstanding the fact that in another section of the country, an equally capable and intelligent man, acting on the same facts but governed by his own personal philosophy, can determine that the man has committed no violation of the law. In other words, without a standard or guide, there can be no uniformity in the enforcement of the provisions of this Act. If the Legislature or the Congress declares the doing or omitting to do of any act to be a crime, it must set up standards by which the average individual can gauge and determine the nature of the violation. We respectfully submit that there is no such standard here. The testimony of Mr. Arlowe on this point emphasizes the interpretation given to the section by this particular office:

> "A. We determine what kind of operation they are doing, first, whether they have ever had a license, what type of operation they are carrying on. If it looks like they are making a broadcast with an unlicensed transmitter and that they are old

enough to realize what they are doing, and if they are using the radio for more than just to test or in preparation for getting a license.

Q. Then you go and talk to them, don't you, and find out what they are doing?

A. No, we don't. We judge from what they say on the air, what they do with it." (R. 283) * * *

It is respectfully submitted that the judgment of conviction should be reversed.

Respectfully submitted,

F. M. REISCHLING,
Counsel for Petitioners.

WARREN CHAN,
Of Counsel for Petitioners.

F. M. Reischling

APPENDIX

Fourth Amendment to the Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES

Section 301, Title 47, U.S.C.A.—License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission * * *. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory

or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the U.S., or (c) from any place in any State, Territory, or possession of the United States to any place in any foreign country or to any vessel; or (d) within any State when the effect of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

Section 318, Title 47, U.S.C.A.:

The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Chapter shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission, if it shall find that the public interest, convenience, or necessity will

be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

Section 781(b) Title 49, U.S.C.

As used in this section, the term "contraband article" means—

(1) any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith, or which is sold or offered for sale in violation thereof, or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearm Act, as now or hereafter amended, or any regulation issued pursuant thereto; or

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used,

or which shall have been used, in the making of any such falsely made, forged, altered, or counterfeit coin or obligation or other security.

Section 1254, Title 28, U.S.C.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Section 2106, Title 28, U.S.C.A.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be held as may be just under the circumstances.

Section 3041, Title 18, U.S.C.

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States commissioner, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such

court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or commissioner shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest.

Section 3052, Title 18, U.S.C.

The Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for felonies cognizable under the laws of the United States, where the person making the arrest has reasonable grounds to believe that the person arrested is guilty of such felony and there is a likelihood of his escaping before a warrant can be obtained for his arrest.

Section 3053, Title 18, U.S.C.

United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

COURT RULES

Revised Rules of the Supreme Court, Rule 38 (28 U.S.C.A.):

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

* * * (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.